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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

## No. 82-

JEFFERSON PARISH HOSPITAL
DISTRICT NO. 2 and
EAST JEFFERSON HOSPITAL BOARD,
Petitioners,

*versus*

EDWIN C. HYDE,
Respondent.

## BRIEF AMICUS CURIAE OF LOUISIANA HOSPITAL ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RICARDO M. GUEVARA
9521 Brookline Avenue
P. O. Box 80720
Baton Rouge, LA 70898
(504) 928-0026
Counsel for Amicus Curiae
Louisiana Hospital Association

Franklin Press, Inc. Baton Rouge, La.

# MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

The Louisiana Hospital Association respectfully moves for leave to file the attached brief *amicus curiae* in support of petitioner's request for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent has been requested but refused.

The interest of the Louisiana Hospital Association in this case arises from the fact that it is a trade organization of Louisiana hospitals whose members are affected by the decision of the appellate court in this case. The Louisiana Hospital Association is in a unique position to represent the interests of the hospitals in Louisiana which are not parties to this action but who will be affected by the eventual outcome of this case. Furthermore, many of our member hospitals are units of multi-hospital systems operating in several states and will be subject to conflicting decisions by the United States Courts of Appeal unless this issue is decided by this Honorable Court.

Respectfully submitted,

Ricardo M. Guevara
Counsel for the Louisiana Hospital Association

## CERTIFICATE OF SERVICE

I hereby certify that I have this _____ day of January, 1983 served copies of the foregoing motion and the attached Brief *Amicus Curiae* of the Louisiana Hospital Association by sending three copies thereof by first class mail, postage prepaid, to each of the following:

Frank H. Easterbrook, Esq.
1111 East 60th Street
Chicago, Illinois 60637
(312) 753-2440

John Landis, Esq.
Stone, Pigman, Walther,
Wittmann and Hutchinson
1000 Whitney Bank Building
New Orleans, Louisiana 70130

Ricardo M. Guevara, Esquire
Counsel for *Amicus Curiae*
Louisiana Hospital Association

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## INTEREST OF THE AMICUS CURIAE

The Louisiana Hospital Association is a trade organization composed of one hundred thirty six (136) hospitals. The Louisiana Hospital Association is the largest organization representing the interests of hospitals in Louisiana. The member

hospitals cover the spectrum of the hospital industry in Louisiana. The Association has as members small and rural hospitals with as few as twenty-one (21) beds and two physicians on their medical staffs as well as major urban tertiary care and teaching hospitals with over six hundred (600) beds and hundreds of physicians on their medical staffs. The needs of these institutions vary greatly. The small and rural hospital may not have enough demand for anesthesia services to support more than one anesthesiologist and the only way the hospital can attract that anesthesiologist is by granting him an exclusive contract. The entire medical staff of the large teaching hospital may be employees of the hospital and perform both teaching and clinical tasks as part of their duties and to open the anesthesia staff to private fee for service non-teaching physicians would be disruptive of the institution's primary goal — the education of student physicians, nurses and other health care providers. The Association's members are nonprofit community hospitals, others are nonprofit hospitals owned by religious orders, others are university-owned teaching hospitals, some are hospital service district hospitals created by the parishes and are political subdivisions of the State of Louisiana, some are federally owned and operated and others are investor-owned for-profit hospitals.

The Association's members are ever cognizant of their obligation to provide high quality medical care to their patients in an economic and efficient manner. The governing boards of member hospitals recognize that they are ultimately responsible for the quality of the medical care rendered in their institutions.

The Louisiana Hospital Association and its members are

vitally concerned in this case because its outcome will affect the manner in which hospitals fulfill their obligations to their patients. The use of exclusive anesthesia contracts is a widely used method of guaranteeing twenty-four hour anesthesiologist availability. *Dos Santos v. Columbus-Cuneo-Cabrini Medical Center*, 684 F.2d 1346, 1351 (7th Cir. 1982). However, such exclusive contracts are not universal. Some member hospitals have open anesthesia staff. What is of utmost importance to the Louisiana Hospital Association is that its member hospitals have the flexibility to be as innovative as legally possible in meeting the unique needs of their patients. If this means using an exclusive contract to provide anesthesiologist coverage then our hospitals should be allowed to so contract. If it means maintaining an open anesthesia staff then the hospitals should have that option as well.

Lastly, many of our hospitals are components of multi-hospital systems which operate nationwide. The investor-owned hospital chains own and operate hospitals not only in Louisiana but in several other states, so do many of the religious orders. These organizations are now faced with conflicting judicial decisions by the United States Courts of Appeals. The United States Court of Appeals for the Seventh Circuit has held an exclusive anesthesia contract not to be violative of the Sherman Act. See *Dos Santos v. Columbus-Cuneo-Cabrini Medical Center* (ibid). The United States Court of Appeals for the Fifth Circuit has ruled in the instant case that an exclusive anesthesia contract is a per se violation of the Sherman Act. Therefore, the investor owned and religious owned multi-hospital systems may use exclusive contracts in one area of the country but not in the states of Texas, Louisiana and Mississippi. Whether an exclusive an-

esthesia contract is a violation of the Sherman Act should not be determined on the basis of where the contract was perfected.

It is for these reasons that the Louisiana Hospital Association supports the position of Jefferson Parish Hospital District No. 2 and East Jefferson Hospital Board and supports the petition for a Writ of Certiorari to United States Court of Appeals for the Fifth Circuit.

## SUMMARY OF REASONS FOR GRANTING PETITION

It is respectfully suggested that petitioner's request for a writ of certiorari should be granted because the appellate court's ruling results in a conflict in the circuits on this issue. Furthermore, the appellate court's ruling in this case calls into question the legality of exclusive contracts with other physician specialists such as pathologists and radiologists. Lastly, the appellate court's ruling results in an inconsistent application of the per se analysis.

## REASONS FOR GRANTING PETITION

The issue presented is whether an exclusive contract, which provides a hospital with the services of a select group of anesthesiologists to provide for the anesthesia needs of the hospital's patients on a twenty-four-hour-a-day-seven-days-a-week basis, is a per se violation of the Sherman Act, 15 U.S.C. subsection 1.

The trial court, the Federal District Court for the Eastern District of Louisiana, held not only that such a contract was

not a per se violation of the Sherman Act but that it satisfied the rule of reason analysis, 513 F. Supp. 539 (1981) at 543. On appeal the United States Court of Appeals for the Fifth Circuit held that arrangement in question was a per se violation of the Sherman Act, 686 F. 2d 286 (1982) at 293.

We believe petitioner's request for a writ of certiorari should be granted because the court of appeals holding does several things. First it creates a conflict in the circuits on this issue. (See *Dos Santos v. Columbus-Cuneo-Cabrini Medical Center*, 684 F. 2d 1346 (7th Cir. 1982). Secondly, in holding that a hospital's exclusive contract for the provision of anesthesia services is per se illegal the appellate court has cast doubt as to the legality of the hospital's exclusive contracts for the provision of other services such as radiology, pathology, cardiology and others. Furthermore, the appellate court's ruling cannot be logically limited to contracts providing for the availability of physician services only. The appellate court's holding jeopardizes the method by which the hospital provides a myriad of services to its patients. Under the appellate court's ruling a hospital could legitimately provide the patient with only one service that being a hospital bed. All the other services which hospitals presently provide would be engaging in tying arrangements. This is so because the provision of the other services (the tied services) would be conditioned upon the patient's use of a hospital bed (the tying service). Therefore, the patient would have to obtain his own nursing services, his own food services, his own respiratory therapy services, his own physical therapy services and so on. All of these services, which hospitals currently provide as a standard course, would have to be obtained by the patient from other sources. This is not how modern hospitals

operate nor is it likely that they could operate under such a scheme. Hospitals are not merely hotels for ill and injured where physicians and other health care practitioners, operating as independent contractors, provide services to the patients. Rather, for the most part, the hospital itself provides these services through its employees or agents. The major exception to this is the provision of services by the patient's attending physician and consulting physicians. The hospital does not sell and the patient does not purchase several products but rather the hospital sells and the patient purchases one product — competent high quality hospital care — which is composed of several integral components such as nursing service, food service and anesthesia services.

Thirdly, the appellate court's decision leaves hospitals and the health industry in a quagmire. On the one hand the appellate court indicates that there is nothing so unique about the health care industry as to preclude the application of traditional per se analyses 686 F.2d 286 (1982) at 293 and on the other hand the appellate court indicates that the trial court erred in applying the traditional method of economic analysis for determining market power because it "assumes that the health care industry functions as a competitve market in the same sense as the industries involved in the plethora of other tying cases and should be subject to the same standards. This is not correct. Several market imperfections in the health care industry favor public not for profit entities, like East Jefferson Hospital." 686 F. 2d 286 (1982) at 291. It seems incongruous that the imperfections of the health care industry are insufficient to preclude per se analysis but are sufficient to allow the use of non-traditional economic analysis for the determination of market power under the per se rule.

## CONCLUSION

Petitioner, Jefferson Parish Hospital District No. 2 and the East Jefferson Hospital Boards, petition for a writ of certiorari to the United States Court of Appeals should be granted because the appellate court's ruling creates a conflict in the circuits, seriously jeopardizes the legality of how hospitals provide services to their patients, and results in an inconsistent application of the per se analysis.